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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 568

UNITED STATES OF AMERICA, Appellant,

v.

SWIFT & COMPANY, ET AL., Appellees.

NO. 569

AMERICAN WHOLESALE GROCERS ASSOCIATION, ET AL., Appellants,

v.

SWIFT & COMPANY, ET AL., Appellees.

NO. 570

NATIONAL WHOLESALE GROCERS ASSOCIATION, Appellant,

v.

SWIFT & COMPANY, ET AL., Appellees.

BRIEF FOR AMERICAN WHOLESALE GROCERS ASSOCIATION, ET AL., APPELLANTS IN NO. 569.

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BRIEF FOR AMERICAN WHOLESALE GROCERS ASSOCIATION, ET AL., APPELLANTS IN NO. 569.

JURISDICTION.

This is an appeal from a final decree modifying a former final decree in a suit brought by the United States under the Anti-Trust laws. The right of these Appellants to appeal is discussed in the statement heretofore filed in compliance with Rule 12 of this Court and this Court has found that probable Jurisdiction exists.

THE ISSUES.

There is here presented issues as to the power of a court nine and a half years after the entry of a consent decree to set aside or materially modify it; and, if such power exists, whether or not the facts presented justify its exercise. The assignment of errors (R. 1120) and the points on which these Appellants rely (R. 1181) show in detail the basis for the propositions argued.

SUMMARY OF ARGUMENT.

1. A Federal Court of Equity, in a proceeding brought under the Anti-Trust laws, having with the consent of all the parties entered a valid final decree enjoining the defendants, has no jurisdiction without the consent of all such parties to substitute after over nine years another and radically different decree.

2. If jurisdiction existed, no material alteration of the original decree should be made unless there is definite proof of facts clearly showing that such modification is legally proper and demanded by the equities of the parties affected.

3. No such modification, whatever the jurisdiction of the court, should be granted where, as here, the petitioners therefor fail fully and fairly to disclose all the relevant facts within their knowledge or in their power to produce.

4. No modification is justified where the petitioners therefor are shown to be guilty, through their agents engaged in the performance of their businesses, of violations of the anti-trust laws of the United States and of the consent decree.

5. As petitioners have received advantages and other parties have waived rights by the contract-consent-decree, petitioners have no equitable right to a modification where, as here, it is impossible to restore the former status.

6. Where petitioners continue to enjoy, whether legally or not, advantages in the transportation by common carriers of their commodities not open to their competitors, there is danger of monopoly and the original contract of settlement may not be changed by any court.

7. A showing of changes in methods of doing business foreseen or foreseeable at the time the contract-decree was agreed on and entered, furnishes no justification for any material change in the contract.

STATEMENT OF THE CASE.

A. Chronological History.

In 1898, a committee of the Senate was appointed and after two years reported that petitioners and others were guilty of restraints of trade.[1]

In 1902, the United States filed its bill to enjoin Swift & Company and other packers including as defendants seven corporations, one partnership and twenty-three individuals, from violations of the Anti-Trust laws and this Court, on January 30, 1905, sustained with modification, the injunction granted May 3, 1903.[2] That decree as modified, is yet in force, and among other things prohibits Armour and Swift from "by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold either directly or through their respective agencies."

The decree further prohibits obtaining freight charges "at less than the regular rates," "by means of rebates or *by any other device.*" The House of Representatives on March 7, 1904, reciting certain conditions, requested the Secretary of Commerce and Labor among other things to investigate[3] "Whether the said conditions have resulted in whole or in part from any contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States and Territories or with foreign countries."

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[1] Report of U. S. Senate Committee on the Transportation and Sale of Meat Products, 51st Cong., 1st Sess., Senate Report No. 829, p. 446.

[2] United States v. Swift & Company, et al., 122 F. 529; Swift & Company, et al. v. United States, 196 U. S. 375.

[3] Document No. 382, 58th Cong., 3rd Sess., Report of the Commissioner of Corporations on the Beef Industry, dated March 3, 1905. This was transmitted to the Congress by President Roosevelt on March 3, 1905.

The packers were then Armour, Swift, Morris, National Packing, Schwarzschild & Sulzberger, and Cudahy Packing Companies, and were generally known as the Big Six.

As a result of court orders the National Packing Company was dissolved and the packers became the Big Five.[1]

Prior to 1917, wholesale grocers experiencing the adverse effect of the power and practices of the Big Five, presented their difficulties to the President. In this the grocers were joined by live stock growers. President Wilson, on February 7, 1917, referred these complaints to the Federal Trade Commission to investigate and report among other things facts[2] "bearing on alleged violations of the anti-trust acts, and particularly upon the question whether there are manipulations, controls, trusts, combination, conspiracies, or restraints of trade out of harmony with the law or the public interest." The report of the Commission was printed and referred by the President to the Attorney General.

In July, 1919, wholesale grocers and associations of wholesale grocers filed complaints before the Interstate Commerce Commission alleging that the railroads of the country, by their rates, tariffs and practices, gave to the Big Five packers an undue and unreasonable preference and advantage to the prejudice and disadvantage of complainants. Appellees here intervened in these proceedings, pleaded that by the consent decree entered after the complaints were filed, that no such competitive relation existed between them and the grocers as entitled the grocers to object to the preferences if any existed. The predecessor of the interveners in whose behalf this brief is filed, believed that this plea was good and did not, for that reason, further prosecute its complaint (Peti-

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[1] This Court in 1922 referred in Stafford v. Wallace, 258 U. S. 495, 499, to some of this history, saying that it appeared therefrom "that for more than two decades, it had been charged that * * * the Big Five were engaged in a conspiracy in violation of the Anti-Trust law * * * ."

[2] Report of the Federal Trade Commission on the Meat-Packing Industry, Summary and Part 1. The first part of this comprehensive report is dated June 24, 1919, and other parts followed shortly thereafter.

tioners' Exhibit 165, R. 1017). The Commission, quoting the contentions of the Petitioners-Appellees and other packers, said:

> "They assert that the entry of the decree eliminated the competition to which the grocers object, and will bring about a result more favorable to the complainants than any obtainable by an order in this proceeding."

and on another page said:

> "The record indicates that the wholesale grocer handles a comparatively small quantity of perishable freight."

The conclusion of the Commission was that no comprehensive relief should be granted on the complaint which was presented.[6]

The Attorney General, on January 17, 1920, testifying before a Senate Committee, described how he found this report when he entered office in March, 1919, how he referred the report to three able and experienced lawyers to "examine the record, analyze it, and make a report as to what sort of case that record had presented." These attorneys having "after several months," made "a comprehensive report," the Attorney General studied such report and "concluded that the Department of Justice would be justified in bringing action against the packers." This conclusion having been reached, the Big Five offered to consent to an adjustment and the consent decree of February 27, 1920, was entered.[7]

B. Judicial History of the Consent Decree.

The consent of the parties became the decree of the court on February 27, 1920 (R. 153).

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[6] National Wholesale Grocers Asso. v. Director General, 62 I. C. C. 375, 381, 388. Record here 1012 ff., and Petitioners' Exhibits 165, 166.

[7] See report dated March 23 and April 21, 1921, entitled Packers' Consent Decree, Senate Resolution 211, pp. 319 to 322 and 925 to 927, and compare Vol. 2 of the report dated March 1, 1923.

Of these Appellants, Mr. Justice Wendell P. Stafford in refusing to strike their intervention, said in part (R. 187):

> "1. The decree was, in part, at least, the fruit of their own efforts;
>
> "2. They abandoned the pursuit of other remedies in reliance upon this decree;
>
> "3. The protection afforded them by this decree might have been secured in a proceeding in their own name and behalf;
>
> "4. The change suggested would leave them in an embarrassed position in now seeking to secure the same protection;
>
> "5. The decree ought not to be modified unless the Court is convinced that the public interest requires it; and the petitioners fairly represent a large and well defined portion of the public whose position will enable them, and whose interest will prompt them, to present to the Court facts or reasons which, among others, the Court ought to hear and consider before allowing the decree to be changed."

About September 10, 1921, these Appellants, interveners below, heard that an agreement had been reached between the Attorney General then in office and the defendants-petitioners-Appellees, to set aside in whole or in part, such decree. To prevent this, these Appellants intervened. Later, the United States moved to strike the intervention and the lower court denied such motion.[5]

No agreement to set aside the decree was consummated.

Congress passed in 1921, the Packers and Stockyards Act.[6] Later, on April 19, 1922, California Cooperative Canneries, a congener of Armour & Company and Associates, herein

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[5] See the original intervention (R. 170), the amended intervention (R. 183), the motion to strike (R. 182) and the opinion and order of the court thereon (R. 187).

[6] 42 Stat. 159, Stafford v. Wallace, 258 U. S. 495.

referred to as Armour, sought by intervention to have the consent decree annulled but this contention did not meet the approval of this Court.[10]

In 1923, Morris and Company was absorbed by Armour and the Big Five became the Big Four (R. 613).

On November 5, 1924, Appellees here moved to vacate the consent decree, claiming it was void. This effort of Appellees-Petitioners to escape from their consent also failed.[11]

Appellees Swift and Company and Associates, herein called Swift, and Armour, in August, 1929, filed their petitions on which relief was later granted by the decree here appealed from. On April 2, 1930, amended petitions were filed as substitutes for the original petitions (R. 200, and 255).

These Interveners-Appellants and another wholesale grocers association moved to strike these petitions, alleging that the court below lacked jurisdiction to grant the prayers of the petitions (R. 310 and 313). These motions were argued and overruled (R. 319). The controversy was then tried before the Honorable Jennings Bailey, a Justice of the Supreme Court of the District, who wrote an opinion (R. 1039 ff.), filed findings of fact and conclusions of law (R. 1110), and entered the decree now here on appeal (R. 1060).

Appeals were filed by the United States and by the intervening wholesale grocers and wholesale grocers associations (R. 1131).

NO JURISDICTION IN COURT BELOW TO ENTER DECREE APPEALED FROM.

STATEMENT.

A consent decree held by this Court to be valid,[12] was entered February 27, 1920. This effort of Appellees to set aside or modify this decree was not made until petitions

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[10]United States v. California Cooperative Canneries, 279 U. S. 553.

[11]Swift & Co. v. United States, 276 U. S. 311.

[12]Swift & Co. v. United States, 276 U. S. 311; United States v. California Cooperative Canneries, 279 U. S. 553.

therefor were filed in August, 1929. A summary statement of the grounds of these petitions may be taken from the introduction to that of Swift, as: "On account of certain radical and revolutionary changes which have occurred" since the entry of the original decree, and petitioners Swift then proceed to describe these changes as follows:

> " * * * in economic conditions, merchandising methods, statute law of the United States and the interpretations thereof, which make this decree unjust, unfair, inequitable and oppressive to these defendants, unnecessary and against the public interest." (R. 201).

Motions to dismiss these petitions were filed, argued and denied. (R. 319).

PROPOSITION.

1. A FEDERAL COURT OF EQUITY IN A PROCEEDING UNDER THE ANTI-TRUST LAWS, HAVING WITH THE CONSENT OF ALL THE PARTIES ENTERED A VALID FINAL DECREE ENJOINING THE DEFENDANTS, HAS NO JURISDICTION WITHOUT THE CONSENT OF ALL SUCH PARTIES TO SUBSTITUTE, AFTER OVER NINE YEARS, ANOTHER AND RADICALLY DIFFERENT DECREE.

ARGUMENT AND AUTHORITIES.

The petitions filed by Appellees are but motions, nine and a half years after its entry, to annul a decree. In view of former holdings of this Court, it cannot be contended that the original decree was not valid and final and the basis of the petitions is that changed conditions give a court at all times power to alter and annul its decrees. Essentially, the petitions are bills of review.

There are two legal contentions which arise out of these efforts to review a final decree. One deals with the decree as a final decree, and the other with a decree not only valid and final, but one to which the petitioners consented.

A. A Final Decree Cannot Be Annulled Or Substantially Modified Except As Authorized By Statute or Equity Rules.

Paragraph 18 (R. 167) of the original consent decree, retains a limited jurisdiction but the jurisdiction so retained is for the purpose stated therein "as may become necessary and appropriate for the carrying out and enforcement" of the decree; and the words "application that the parties may make with respect to this decree," refer to what is "appropriate" in the "enforcement" thereof.

The Equity Rules of the Supreme Court of the District of Columbia permit petitions for rehearing but in a case like this, only during "the term at which the final decree of the court shall have been entered and recorded."[13] A bill of review under such rules, may be filed only "within two years after the entry of the decree."[14] In discussing the rule of limitation when the bill of review is based on "new-discovered facts and evidence," Judge Story said:[15]

> "There can be no doubt, that it will be a good bar, that the Bill of Review is not brought within the period limited for writs of error, after the discovery of the new facts or evidence."

As will later appear, and as shown in Appellee's petitions, the facts they now claim as showing changed conditions were known, some as early as 1921, and all were adumbrated even in 1920. The Packers and Stockyards Act relied on (R. 234), was passed August 15, 1921;[16] chain stores existing and growing prior to 1920 began their more rapid expansion

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[13]Rule 45.
[14]Rule 58.
[15]Story, Equity Pleadings, 6th Ed., Sec. 419.
[16]42 Stat. 159.

in 1921 or 1922 and this expansion continued to 1929,[17] and all the alleged changes in conditions were known to all the world to have begun and to be progressively increasing prior, certainly, to 1925.

If petitioners had not been guilty of laches and were not barred by the limitation of the rules of practice, it is submitted that this is not a case in which the court below, at the time when the petitions were filed, had jurisdiction.

The case of *Ladner v. Siegel*,[18] with annotations, refers to the leading decisions of State Courts holding that an injunction decree, operative in the future, may, under some circumstances, be modified. The grounds justifying such modification are stated in this case:

> "The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, and (b) where the law, common or statutory, has changed, been modified or extended, and (c) where there is a change in the controlling facts on which the injunction rested."

The court was dealing with a case where an injunction was issued preventing the construction and use of a public garage in an "exclusively residential" district and which decree was modified because the district had become "not an exclusively residential district within the meaning of that term." We need not and do not question the propriety of

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[17] The Great Atlantic & Pacific Tea Company has grown each year since 1922 (Pet. R. 826A). Kroger Grocery & Baking Co. since 1920 (Pet. R. id.). The Report of the Federal Trade Commission relied on was published February 20, 1925; the same Report shows that information about slaughtering and meat packing establishments was known February 17, 1925. Reliance is had on the report of the Secretary of Agriculture showing statistics for 1923. The decision of the Interstate Commerce Commission relied on was rendered June 22, 1921, 62 I. C. C. 375.

[18] 298 Pa. 487, 148 Atl. 699, 68 A. L. R. 1172.

the decision in *Ladner v. Siegel*, but we submit that there is nothing in the facts here which brings this case or other cases cited therein within the principles of that decision.

Here the defendants-Appellees show a long history of monopolistic conduct, efforts to prevent which had failed; and it was deemed necessary, in order to prevent this and protect the public, that they should limit their respective businesses to the manufacture, transportation and sale of meat and meat products. In their brief filed September 7, 1920, in the Interstate Commerce Commission (Exhibits of Petitioners, Nos. 165 and 166), Appellees stated the argument they now make to support their claims for release from the decree as reasons why they were doing the things enjoined by the decree.

They said:

> "The packers had found it to be economical, from a business standpoint, in view of the organization and facilities already existing and necessary for the sale of fresh meats and packing-house products, to utilize that organization and those facilities for the handling and sale of certain other articles. Such utilization tended to reduce the overhead expense as well as the selling expense in connection with all of the articles dealt in and was, therefore, a practice of benefit to the public as well as to the individual packer. Nevertheless this action of the packers brought about numerous protests, the present proceeding (62 I. C. C. 375) being in fact one of the efforts made by certain classes of merchants towards eliminating the competition in certain articles of the packing companies."

Having thus described conditions which, if they ever existed, continue now, Appellees explained why they consented, saying:

> "It was in order to make publicly of record such an absolute and unqualified denial of any effort to monopolize the food products of the country as could not be disputed by any intelligent mind that the packers defendant in the equity proceeding consented to the entry of the decree in that case."

The "controlling facts" as to the practices described above which existed in 1920 and prior thereto and were potent in producing the complaints which caused the bringing of the suit by the United States and as to Appellees' reasons for agreeing that they would discontinue former practices, existed then and exist now and will continue so long as Appellees use their organizations and facilities "for the handling and sale" of articles other than meats.

B. A Final Valid Consent Decree Cannot Be Substantially Altered Except By Consent.

This court, in *Swift & Company v. United States*,[11] stated what, we submit, are controlling rules here. It was there said:

> "Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error." * * *
>
> "In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered." * * * "or that there was lack of federal jurisdiction because of the citizenship of the parties." * * *
>
> "But 'a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' " * * *

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[11] 276 U. S. 311, 324 and authorities cited. See also: Nashville, etc., R. R. Co. v. United States, 113 U. S. 261, 266; Thompson v. Maxwell Land Grant & R. Co., 168 U. S. 451, 463; McGowan v. Parrish, 237 U. S. 285; United States v. Babbitt (1882), 104 U. S., 14 Otto 767; R. R. Co. v. Ketchum, 101 U. S. 289; Hodgson v. Vroom, 266 Fed. 267, 268, 269; Wilson v. Haber Bros., 275 Fed. 346, 347; Harniska v. Dolph (1904) 133 Fed. 158, 66 C. C. A. 224; Garrett & Co. v. Sweet Valley Wine Co., 251 Fed. 371; Ruling Case Law Vol. 10, Sec. 347; Daniell's Chan. Plead. & Prac., 4th Ed., Vol. 2, pp. 973, 974; Edney v. Edney, 81 N. C. 1; and 21 C. J. 813, 815.

> "Where as here, the attack is not by appeal or by bill of review, but by a motion to vacate, filed more than four years after the entry of the decree, the scope of the enquiry may be even narrower."

It would seem that the decisions of this court settle the issue, but Appellees in the court below relied on decisions to which we now refer.

In *American Press Association v. United States, 245 Fed. 91*, a decree was construed. It is true that the word "modification" is used in the petition, but the provisions of the original decree, copied at p. 92, show that these provisions merely require enforcement in order to accomplish what the defendant in the original suit desired and sought.

The case of *United States v. DuPont, 273 Fed. 869*, is another case showing the distinction between construction and modification. At p. 872, the court said:

> "It (meaning the motion to construe or interpret), will not change any term or provision of the final decree as it bears on the issues decided or on the parties concluded thereby."

At p. 873, the court said that it would have no jurisdiction to make an order that would violate the decree, and that what it was doing was "looking to the continued prevention and restraint of violations." The application there made was by a party not in the original suit and the court said it was exercising only the power "to make its *enforcement* conform to conditions." In stating the question near the bottom of p. 873, it is plain that the court was discussing a construction—not a change—of the decree, and on p. 874, the words "interpret" and "construe" are used. At p. 875, the court says it is to determine "whether it (the relief asked) would violate the decree in any of its aspects."

It is true that the United States agrees that the court below had jurisdiction to modify the consent decree, but it does not agree to any modification, and consent cannot confer jurisdiction especially when as here, there are others interested who abandoned other remedies in reliance on the contract-decree and who become parties by intervention after the consent was entered but before the petitions to modify were filed.

THERE ARE NO SUFFICIENT FACTS TO JUSTIFY ANY MODIFICATION.

PROPOSITION.

2. IF JURISDICTION EXISTED, NO MATERIAL ALTERATION OF THE ORIGINAL DECREE SHOULD BE MADE UNLESS THERE IS DEFINITE PROOF OF FACTS CLEARLY SHOWING THAT SUCH MODIFICATION IS LEGALLY PROPER AND DEMANDED BY THE EQUITIES OF THE PARTIES AFFECTED.

Nowhere is this proposition supported more definitely than in *United States v. Discher, 255 Fed. 719*, where the original decree provided that:

> "The court *retain jurisdiction* to enable the parties to apply for modification if it be thereafter shown that the provisions have become inadequate to maintain competition or have become unduly oppressive to the defendants."

The court then refused to modify the decree and said (p. 720):

> "To modify the decree to which the defendants consented with their eyes open I should have convincing proof that it is unjust and burdensome."

That no contract, decree or contract-decree will lightly be set aside is so fundamental that authorities to support the proposition are not needed.

The opinion of the court below, as we construe it, shows that there is no sufficient proof justifying the decree of modification.

THE OPINION OF THE COURT BELOW ANALYZED.

The contentions of Appellees that the growth of chain stores, the integration of food distributing agencies and the broadening activities of small packers constituted changes justifying modification, are unsupported in the opinion of the Court (see Opinion, R. 1039 to 1059). The Court found that

both Appellees had about the same volume of business in 1929 as in 1920 (R. 1045); that chain stores had increased after 1920 (R. 1046); that integration had also increased (R. 1047); and that the percentage of profits on net worth for 1929 of Swift was 5.78; of Armour, 3.54; of Cudahy, 6.26 (R. 1047). Following these findings, the Court said (R. 1049):

> "The petitioners lay great stress upon the buying power of these large chain stores;"

and after some discussion, continued (R. id.):

> "I think that the petitioners exaggerate these dangers. The chains do a very small part of the slaughtering business, and are themselves largely dependent upon the petitioners for their supplies. There is constant and keen competition, and I do not see that the size of the chains give them any unfair advantages over the packers. The imminent development of the quick freezing process will largely do away with the necessity of any immediate disposition of perishable products."

The Court then calls attention to "some rather singular facts" as to the profits of Appellees and says (R. 1049):

> "Armour's profits have varied largely from year to year and have not followed inversely the rise of the chain stores. Swift & Company's profits have exceeded Armour & Company's upon substantially the same amount of business. Whether these variations may be due to differences in the success of their foreign business, or to difference in skill in management does not appear, and the failure to account for this largely weakens the argument of the petitioners based upon their small returns in business. *I think that there has been a failure to make a full disclosure of the facts in this respect.* Swift & Company have paid dividends *regularly for forty-four years and from 1920 to 1929* at the rate of eight per cent and during the same time has added to its surplus and reserve over sixteen million dollars. The percentage in profits of the Cudahy Packing Company has exceeded Swift's during the same period.
>
> "On the whole, therefore, I do not think that the claim of the petitioners that the development of the chain stores has caused any great loss in their profits has been established." (Italics supplied).

In this connection, it should be noted that Appellees give no facts as to their earnings prior to 1920, and it should also be remembered that each of the Appellees is engaged in many businesses other than that of converting live animals into meat; that they conduct businesses in foreign countries and they wholly failed to explain whether or not these outside and foreign businesses were profitable.

Brief references to the testimony in the record emphasize the court's statement that Appellees had failed to make a full disclosure of the facts with reference to their respective businesses. Appellees do not show what their sales or profits were prior to 1920. Certainly the results of the more normal years of 1913 and 1914 should have been given the court. The keen competition on which Appellees so much rely as now existing, was admitted by their witnesses to have been the same for a large number of years.

Mr. Heinemann, testifying for petitioners (R. 537), said that this competition had continued since 1903. This Court judicially knows that the coming of the boll weevil in the cotton growing states has materially affected the consumption of fertilizer since 1920. Appellees fail to show any facts concerning this particular part of their respective businesses.

The record shows that Cudahy & Company does not engage in this character of business and that its profits are relatively higher than those of the Appellees.

Mr. Clithero, Assistant Comptroller of Armour by Exhibit 72, showed that in 1924 the profits on investments of Armour were 6.57% on sales totalling $875,000,000; while on sales for 1927 totalling $961,000,000, the profits were only .19% (R. 888A). This was true although the competitive element in both buying and selling was practically the same in the two years named. The witness also showed that Armour's sales were practically the same in 1925, 1927, and 1928, although the chain store development had taken place before these years.

Attention is called to the fact that by Appellees' Exhibits, Nos. 112 and 113, it appears that for the year 1920 Armour sold, in what is called the unrelated items, (R. 540), those included in the prohibitions of the injunction, to a value in ex-

cess of $34,000,000; while for the year 1924, the sale of these unrelated items totalled only $2,318,318 (R. 941). In the year in which the large sales of unrelated items occurred, Armour's profits were .89% while in the year in which the smaller sales occurred, the profits were 6.57% (see Exhibit 72, R. 888a). It is fair to infer that the sale of unrelated items now sought by Appellees, is not a profitable business and this inference is further supported by the experience of Cudahy & Company, which company does not engage in the sale of these items, and which company shows regularly much better earnings than those of Appellees.

The annual reports of Armour for the years 1926 and 1927 show that in the domestic market, the operations were on a "satisfactory basis," but that these domestic results were to some extent, offset by the results in the South American field and in the reports made, there was no separation of these different operations (R. 540).

It was admitted by the President of Armour that

> "for each year since 1925, except 1927, the exports were in excess of the average from 1910 to 1914. The dollar sales of Armour & Company for 1929 were larger than those for the six or seven preceding years."

None of the witnesses for Swift, Armour or Cudahy and none of the executive officers of those respective companies would if they could give any explanation of the widely varying profits of these companies.

The Court then proceeds to discuss the size of petitioners' businesses, cites the Steel Case, *United States v. United States Steel Corporation, 251 U. S. 417, 429*, and says (R. 1050):

> "The business of each (Appellees) is far less than that of its combined competitors. The great weight of the testimony is that no combination or agreement in restraint of trade exists between them."

After this statement, the Court finds "certain sporadic cases of unfair practices" were shown, briefly recited and found to be "substantially true," although "no worse than those of their competitors" and that there was "no evidence that the officials in the main offices of the defendants had any

knowledge of these practices but on the other hand they had forbidden any agreements or arrangements to fix prices" (R. 1051).

The Court then concedes that "it is not incumbent upon the government to establish the allegations of its original petition in the same way as if the case were being heard for the first time on its merits" (R. 1052), although we submit, it is a fair inference from the opinion that the Court acted on the assumption that the Government was expected to prove a case under the Anti-Trust laws.

The opinion then discusses the relation of Appellees to stockyards; shows how the Packers and Stockyards Act of 1921 is administered; says as a result of the use of peddler cars that the usee "either pays less freight for the shipment of his meat than he would otherwise do, or he is enabled to ship his other commodities almost without expense" (R. 1054); quotes the decision of the Interstate Commerce Commission in its 1921 opinion; describes the development of hard surface roads and the consequent increase in the use of trucks; and discusses a quick freezing process which will end one advantage now claimed to be enjoyed by the small packers and concludes (R. 1056):

> "While the Packers and Stockyards Act, the control of the terminal railroads by the Interstate Commerce Commission and the present wide spread and prompt dissemination of market news has, to a considerable extent, *diminished the danger* arising from the petitioners' ownership of these facilities, I think that it would be unwise to modify the Decree in these respects. There are many *opportunities for secret preferences* in the operation of the stockyards and of the terminals, and much for propaganda and distortion of news in newspapers. It is probable too that Congress would have made the provisions of the Packers and Stockyards Act even more stringent had it not been for the Decree." (Italics supplied).

Of the advantages of "reciprocal buying" which large shippers, including Appellees, obtain, it is said (R. 1057):

"I consider this *an element of danger* with opportunities for secret rebates and preferences, but the government admits that while this practice on the part of petitioners shows a tendency to unfair trade practices, it is not illegal and by no means confined to the petitioners."[20]

The basic principle of the decision is stated as follows (R. 1057):

"I do not think that in order to show a right to modify the injunction in any one respect, the changes in conditions which would justify such a modification should be limited to those bearing particularly upon that one question, but the entire change of conditions in the distribution of foods, those brought about by economic changes and practices, those brought about by the changes in the conditions and practices of the petitioners, and changes in the statutes and laws must be considered, and if by reason of those changes, any provision of the Decree can be modified without danger of monopoly, or the probability of acts in restraint of trade or unfair practices on the part of the petitioners, then the Decree should be modified."

The opinion then rediscusses stockyards, peddler cars, increase in the number of stores retailing both meats and vegetables, "combined food stores," finds "no danger of a monopoly * * * arising from the use of refrigerator cars" (peddler cars?) and finds that as to retailing, the decree should not be modified because "even if they (Appellees) should not go into the business of retailing, if they had the power to do so, there is a *real danger* of the *misuse* of that *power*" (R. 1058).

The conclusion of this argument is (R. 1059):

"The policy of Congress as shown by the statutes enacted by it and as interpreted by the Supreme Court is to preserve and stimulate competition, and to permit the defendants to engage in the retailing of their own products would, in my opinion, have the opposite result."

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[20]An examiner of the Interstate Commerce Commission has, in Docket 22455 on January 20, 1932, condemned this practice but the Commission has not as yet acted on his findings.

Although the Court found there is danger of the *misuse* of power in owing retailing establishments, the opinion concludes with this non sequitur (R. 1059):

> "The decree will therefore be modified so as to permit the defendant packers to manufacture, sell and deal in the commodities specified in paragraphs fourth and fifth of the Decree, and referred to in this case as unrelated lines, and to use or permit others to use the distribution facilities of the defendants in handling these unrelated lines, but in all other respects the Decree will remain in full force and effect, and the defendants required to comply promptly with the Decree, in every respect in which they have not heretofore complied with it."

It is respectfully submitted that the court below failed to apply the law of this case stated in *Swift & Company v. United States, 276 U. S. 311, 326,* as follows:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated."

PROPOSITION.

3. NO SUCH MODIFICATION, WHATEVER THE JURISDICTION OF THE COURT, SHOULD BE GRANTED WHERE, AS HERE, THE PETITIONERS THEREFORE FAIL FULLY AND FAIRLY TO DISCLOSE ALL THE RELEVANT FACTS WITHIN THEIR KNOWLEDGE OR IN THEIR POWER TO PRODUCE.

Petitioners, Appellees, having consented to a decree fixing a particular method of conducting their businesses, should, when seeking to escape from the terms of that contract, fully and truthfully show all facts relevant to the claim that such decree should be substantially changed. This they did not do.

Appellees are engaged in many businesses; they have branches in foreign countries (R. 1036a) and they wholly failed to give details of such businesses and made no attempt to show whether their claims of inadequate earnings resulted from these businesses unaffected by the consent decree.

Appellees claim that conditions have changed since February 27, 1920, the date of the entry as a decree of the agreement made with the Attorney General. They failed to show all the conditions in respect of the matters included in the decree existing at or before that date. How can a court say what changes have occurred without full knowledge of what existed before it is claimed changes began?

Appellees, when pressed to say what they proposed to do if the relief they asked were granted, expressed themselves as not having decided what they would do.

Mr. F. Edson White, President of Armour, (R. 636) testified:

> "I have never felt in the situation as it now stands, that we could serve any purpose by making any definite plans."

Indeed, in the testimony of Mr. White (R. 634 to 636) and of Mr. Gustavus F. Swift, Vice President of Swift (R. 641), they were discussing the retail business, saying little about wholesaling. Mr. Swift said:

> "We have no plans with reference to the retailing of meats and groceries in case liberty is given us to do so by modification of the Consent Decree."

Armour and Swift, in 1929, did approximately the same volume of business.

Armour's net earnings from 1923 to 1929, inclusive, have been as follows:

	Amount	*Percentage on Net Worth*
1923	$15,691,000	5.26
1924	18,310,000	6.57
1925	14,452,000	5.04
1926	8,148,000	2.84
1927	538,000	.19
1928	11,326,000	4.09
1929	9,811,000	3.54

(Appellees' Ex. 111).

Earnings of Armour in its domestic business for the years 1926 and 1927 were very substantially in excess of those contained in the above statement but large losses were suffered by Armour in its South American business (Appellees' Ex. 126).

The Appellee Swift, owns 441 branch houses; owns 5,509 refrigerator cars and operates 1,014 car routes (Appellees' Ex. 143).

Swift owns a majority of the voting stock of Libby, McNeil & Libby, which company is engaged in the canning and distribution of fruits, vegetables, milk and other products (R. 642).

Swift's net earnings from 1922 to 1929, inclusive, have been as follows:

Year Ending	*Amount*	*Percentage on Net Worth*
Nov. 4, 1922	$13,049,217	6.1
Nov. 3, 1923	13,184,619	6.2
Nov. 1, 1924	14,125,988	6.6
Oct. 31, 1925	15,379,152	7.1
Nov. 6, 1926	15,645,242	7.1
Nov. 5, 1927	12,202,493	5.4
Nov. 3, 1928	14,813,182	6.6
Nov. 2, 1929	13,076,815	5.8

(Appellees Ex. 136).

The opinion of the court below (R. 1045) shows sales as follows:

	1920	*1929*
Swift	$1,052,039,000	$1,035,263,000
Armour	1,260,280,000	1,004,196,000

Asked for an explanation, Mr. Swift testified (R. 649):

> "I have no explanation to make of the wide difference of earnings between Swift & Company and Armour & Company. Our employees appear to number approximately 10,000 less than theirs. I think their compensation would average at least $1,000 a year, which alone would amount to a difference in cost of $10,000,000. Swift & Company has been paying dividends consecutively

ever since I can remember. Myself and five or six directors of Swift & Company are directors of Libby, McNeil & Libby, out of a total of 11, I think."

Cudahy & Company shows much better earnings than either Armour or Swift. What Mr. Cudahy, its Vice President, said is illuminating. He said (R. 689 to 690):

"Our operations are as broad, territorially, as those of Armour and Swift, but not as intensive, i. e., we have four branch houses in New York City, as against possibly 26 for Swift & Company. I think we sell more products per branch house than our competitors." * * *

"We formerly handled groceries and other socalled unrelated lines through our branch houses, but discontinued it in 1920 upon the entry of the Consent Decree and have not resumed it since. We have no plans as to what we might do in case the decree were modified, but I would say that we would not enter the grocery business." * * *

"Cudahy & Company do not own or operate fertilizer factories, nor tan hides, nor at this time manufacture soap. The price on hides is less now than in 1920. That is true also of tallow. We manufacture as many by-products as do Swift and Armour in the *meat* line. We do not manufacture as many inedible by-products as do Swift and Armour nor do we sell groceries through our distributing houses. Cudahy sells, as shown by the evidence in this case, about six times its capitalization, which is from 60 to 50 per cent higher than the percentage of Swift and Armour. I do not know any explanation for that other than that we utilize our facilities more extensively."

If this is the explanation, the consent decree which Cudahy and Company is not seeking to set aside, is needed by both Armour and Swift.

PROPOSITION.

4. NO MODIFICATION IS JUSTIFIED WHERE THE PETITIONERS THEREFOR ARE SHOWN TO BE GUILTY, THROUGH THEIR AGENTS ENGAGED IN THE PERFORMANCE OF THEIR BUSINESSES, OF VIOLATIONS OF THE ANTI-TRUST LAWS OF THE UNITED STATES AND OF THE CONSENT DECREE.

Mr. Justice Bailey found unfair and illegal practices by the agents of the Appellees (R. 1051), but he said:

> "It does not appear that the acts of Armour and of Swift were any worse than those of their competitors, nor that the final agreements were forced upon the others by Armour and Swift, but were for the benefit of all."

The fact that others may be guilty does not lessen the fact that the described acts were unlawful.

He further said (R. 1051):

> "That Wilson, Armour and Swift were working under an agreement in Oklahoma as to minimum prices to be obtained on fresh pork; that in certain territories salesmen of Armour, Swift, Wilson and other packers since the summer of 1929 received weekly confidential lists of identical minimum prices; that during the same time, Armour & Company induced the Vernon Meat Company, of Vernon, Texas, to join with them and others for the observance of minimum prices to their retail customers, the prices being furnished unsigned in a plain envelope, marked 'strictly private.' "

That the Court deduced from these facts that "there is no evidence that the officials in the main offices of the defendants had any knowledge of these practices, but on the other hand they had forbidden any agreements or arrangements to fix prices," does not show that there are not yet elements of danger. If the activities of Appellees are so broad in scope and so uncontrolled that their executives cannot prevent restraints of trade and commerce, the danger is even greater than if these officers knew what was being done by their thousands of employees.

This Court, in *Swift & Company v. United States, 276 U. S. 311, in Note 1, pages 319 and 320*, names violations of law by the packers, quotes the old case of *Swift & Company v. United States, 196 U. S. 375*, refers to a case in the District Court against Armour & Company, to the history of the packers contained in *Stafford v. Wallace, 258 U. S. 495*, to certain reports of Congress and to the report of the Federal Trade Commission on the meat packing industry. The facts so shown illustrate the character of the packers and establish that they have been law breakers throughout their existence.

We need not discuss in detail the evidence of the danger of monopoly, restraint of trade and unfair methods of competition which this record and the Court's opinion show exists, but it may be said that there is evidence of departures from published prices, of discrimination between buyers based solely on the extent of the competition in the several localities, of a scheme of reciprocal buying with railroads partaking of the nature of rebates; that coercion of, spying upon, and agreements on prices with competitors exist; that whether lawful or not advantages exist because of the use of peddler cars not equally open to grocers; a continuance of the purchase of competing businesses,[11] and purchases at high prices and sales at low prices not justified, and made to injure competitors.

The case of *United States v. United States Steel Corporation, 251 U. S. 417*, relied upon by Appellees, is unlike the instant case. In that case it was shown that the Steel Company did not secure freight rebates, did not obtain customers by secret rebates or departures from its published prices and that it made no difference between large and small competitors, and the decision of the District Court is quoted to the effect

[11] Note especially the competition between Armour and Morris, even after the merger of these competing concerns, and throughout the record where Morris branch houses were abandoned because Armour already had ample facilities in that territory and the facilities of Morris competed in the same market. See also the increase in the number of plants bought by Swift, such as Moultrie Packing Plant and those shown in the Western Meat case. Swift & Co. v. Fed. Trade Comm., 8 Fed. (2d) 595, 272 U. S. 554.

that the power of the Steel Corporation was not commensurate with its size. Again reference is made to the meaning of the word "integration," and the opinion of the District Court that "size had no accusing or excusing influence" was referred to. Summarizing this discussion, this Court said:

> "In other words, our consideration should be of not what the corporation had power to do or did but what it *has now power to do and is doing.*" (Emphasis supplied.)

Here the Appellees have power to restrain commerce and are doing so. The livestock growers (R. 477) feared the release of the Appellees from that part of their contract relating to stockyards and Mr. Justice Bailey said that while the Packers and Stockyards Act of 1921 had "diminished the danger:"

> "I think that it would be unwise to modify the Decree in these respects. There are many *opportunities for secret preferences* in the operation of the stockyards and of the terminals, and much for propaganda and distortion of news in newspapers. It is probable too that Congress would have made the provisions of the Packers and Stockyards Act even more stringent had it not been for the Decree."

PROPOSITION.

5. AS PETITIONERS HAVE RECEIVED ADVANTAGES AND OTHER PARTIES HAVE WAIVED RIGHTS BY THE CONTRACT-CONSENT-DECREE, PETITIONERS HAVE NO EQUITABLE RIGHT TO A MODIFICATION WHERE, AS HERE, IT IS IMPOSSIBLE TO RESTORE THE FORMER STATUS.

As shown above (p. 10), these Appellants abandoned remedies because of the consent decree, the United States abandoned threatened prosecutions and the civil remedies it contemplated pursuing. Appellees themselves relied on this decree as a defense to the complaints of these Appellants before the Interstate Commerce Commission.

Complaint was filed before the Interstate Commerce Commission and Appellees here intervened in the complaint and in their brief before the Commission, as shown above (pp. 8, 15), relied on the consent decree.

In giving effect to Appellees' contention, the Commission said:[22]

> "The record shows clearly that there is little if any dealing or shipment by the wholesale grocers in dressed poultry, butter and eggs. They (Appellees herein) assert that the entry of the decree eliminated the competition to which the grocers object, and will bring about a result more favorable to the complainants than any obtainable by an order in this proceeding."

This ruling by the Commission recognized the plea set up in that case by these Appellees when they plead that the consent decree made impossible prejudicial action by the railroads in future which in the past had caused the complaint by the wholesale grocers.

Appellees also received as found by Mr. Justice Bailey advantages in the Packers and Stockyards Act of 1921.

The Act itself defines "packer" in such way as excludes the grocery business[23] and in sustaining the constitutionality of the statute the Supreme Court discusses the legislative history which shows that the Congress in passing the statute had in mind the Consent Decree.[24]

The Senators specifically said that the statute was "based on that Decree."[25]

On April 2, 1920, the Attorney General told a committee of the Congress the history, character and purposes of the decree.[26]

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[22] National Wholesale Grocers Asso., et al. v. Director General, 62 I. C. C. 375 and Appellees' Exhibits 165 and 166.
[23] Sec. 201 Act; 7 U. S. C. Sec. 191.
[24] Stafford v. Wallace, 258 U. S. 495.
[25] Cong. Record, Feb. 3, 1922, pp. 2342, 2343.
[26] Meat Packing Legislation. Hearings Before the Committee on Agriculture, House of Representatives, Sixty-sixth Cong. 2d Sess., April 3, 1920, pp. 2309 to 2357.

PROPOSITION.

6. WHERE PETITIONERS CONTINUE TO ENJOY, WHETHER LEGALLY OR NOT, ADVANTAGES IN THE TRANSPORTATION BY COMMON CARRIERS OF THEIR COMMODITIES NOT OPEN TO THEIR COMPETITORS, THERE IS DANGER OF MONOPOLY AND THE ORIGINAL CONTRACT OF SETTLEMENT MAY NOT BE CHANGED BY ANY COURT.

The court found that the use of peddler cars gave Appellees advantages (above p. 22).

A witness for Appellees (R. 674) showed how peddler cars may be used without additional cost in shipping groceries:

> "For instance, if we assume that the minimum is 10,000 pounds, and the rate is $1 a hundred, 8,000 pounds at that rate would come to $80, but we would still have to pay $100 to move it in that car. We could then, without paying any more money, put enough groceries or any other specific products up to 2,000 pounds in that car to raise the rate up to $100 without paying out any more total revenue on the car."

There are many tariffs relating to peddler cars with differing provisions—some more and others less advantageous to Appellees, but as some tariffs give special benefits and all give, as the court below found, general advantages, the existence of such special benefits and of advantages suitable only for use in transporting packing house products shows another element of danger and explains why the consent decree was and is necessary in the protection of fair methods of competition.

One of the reasons why the United States brought the original bill herein was the advantages given Appellees because they could and did use peddler cars. The report of the Federal Trade Commission, on which the Attorney General acted in bringing this complaint, at page 42,[11] said:

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[11] Report of The Federal Trade Commission on the Meat Packing Industry—Summary and Part I—June 24, 1919.

"This system of wholesale distribution through branch houses and peddler cars is the bulwark of monopoly. There is virtually no limit to the possible expansion of their wholesale merchandising short of the complete monopolization of the primary distribution of the Nation's food."

The finding is not here urged as evidence but as a historical statement showing the contentions which were settled by the consent decree. Nor is it material now whether of not such a finding shows unlawful preferences. The claim of preference and undue prejudice was presented and settled by the contract of adjustment. That the advantages described by the Federal Trade Commission should no longer continue was a reason for limiting the use of these peddler cars to their original purpose, that of hauling perishable meats and meat products for packers.

Equitably and fairly, the defendants in this case are estopped from seeking relief from their contract after they have received the benefits thereof. In effect, the contract has been executed on the side of the public and now, the public having fully paid the consideration, the defendants seek to evade their obligations to perform their part.

PROPOSITION.

7. A SHOWING OF CHANGES IN METHODS OF DOING BUSINESS FORESEEN OR FORESEEABLE AT THE TIME THE CONTRACT-DECREE WAS AGREED ON AND ENTERED FURNISHES NO JUSTIFICATION FOR ANY MATERIAL CHANGE IN THE CONTRACT.

Appellees' petitions are long and involved, but we believe all the claims thereof may be discussed under the following heads:

(A) Trucks; (B) Chain Stores; (C) Branded Goods; (D) Integration of Food Distributors; (E) Need for Further Utilization of Branch Houses; (F) The Livestock Grower; (G) Fruit and Vegetable Producers; (H) Dairy Products and

Produce; (I) Stock Yards; (J) Packers and Stockyards Act, 1921; (K) Changes in Court Decisions; (L) The Effect of The Consent Decree on Petitioners.

A. Trucks.

Unquestionably there has been since 1920, a large increase in the mileage of hard surfaced roads, with a consequent increase in the number of trucks operated thereover. It may be true that the petitioners do not have to the same extent advantages over wholesale grocers and others who distribute by truck as they had when they and their competitors all used railroad transportation. It may be that to the extent that all shippers use trucks, Appellees' peddler car advantages are lessened.

However this may be, the use of trucks by the petitioners is part of the plan followed by them and complained of in the original suit brought herein. In the petition of the United States herein, auto trucks are alleged as "a further development of the route-plan." It is also said therein that "these auto trucks reach and serve a total of 20,836 towns." Conditions then alleged to be unlawful have become intensified and petitioners now as then use trucks "as a supplement to their car routes."[11]

B. Chain Stores.

Much of this record relates to facts concerning chains of grocery stores, their large profits and the large increase in their numbers and the total sales by them. These facts do not justify the addition of Appellees to the already adequately occupied field of merchandising groceries, nor do they furnish any justification for the repudiation by Appellees of their contract of February 27, 1920.

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[11] (R. 23). Swift made no answer to this allegation as to "auto trucks" but said: "Small packers doing a local business" do not need route cars. (R. 35). On this point Armour said: "Motor trucks make possible the rendering of such service to many towns and places which are not reached or served by route cars or by branch houses," and the number of towns reached by trucks "is about 1,500."

Chain stores are not new. We learn from his autobiography that Benjamin Franklin some 200 years ago established a chain of printing shops throughout what was then British Colonies, later the original thirteen states; and The Great Atlantic & Pacific Tea Company is seventy-two years old and became a grocery chain in 1890 or 1891, extended in 1911 or 1912 when it entered the retail grocery field in a large way, and since 1912 there has been a continuous development of the business of this greatest of grocery chains. (R. 739ff). This chain does and must rely on the Big Four for its supply of meats. Its president, Mr. Hartford, frankly declared:

> "I do not think it would be possible to supply these stores with the grade of meats that we want from the small independent packers; if that is what you mean, sir. We have what we term at headquarters the Big Four. I do not believe, sir, we could supply our stores with the quality of meat, particularly in the eastern division which I am familiar with, because their office is right in our office at headquarters, without the big packers. I do not think the smaller men are in a position to give us the service or the quality.
>
> "I think I am correct, sir, in stating that in the eastern division, to make my point clear, about 90 per cent of our entire meat business is bought through the Big Four, or the large packers. It is convincing to me, sir, that due to the very large sales of meats in that division, we are getting better quality. I really think it would cause our company tremendous embarrassment—I do not know what we would do if we lost those channels. We can buy twenty carloads of meat from these men and we will get it in and it is proper and right to go out. That is, it would cause our company a considerable embarrassment, it seems to me, if we could not buy from them."

These facts undisputed and indisputable and which are supported by other cumulative evidence of record show that chain stores and large independent retail stores but furnish to Armour and Swift valuable customers who buy in great quantities. (See especially Record 746).

Mr. J. Frank Grimes showed that the voluntary chains are not and cannot be hurtful to the packers, but that the entry of the Big Four into retailing would be dangerous (R. 761 ff). The Court below therefore found against Appellees on this point.

C. Branded Goods.

Mr. Louis F. Swift, on January 9, 1930, in reporting to his stockholders, showed what he thought of brands. He said:[11]

> "*Years ago*, almost all dry groceries were sold in bulk, but the greater sanitation and convenience of the modern package has almost universally won the favor of consumers. In conformity with the trend of the times, Swift & Company for *many years* has been selling some of its meat products, such as bacon and lard, in convenient packages. The sale of these packaged products had *increased rapidly* and indications point to even more rapid growth in the future."

This claim of petitioners is evidently presented to fill in and to add to the number of claims without any addition to their quality.

D. Integration of Food Distributors.

As we understand this claim of Appellees with the conclusion sought to be deduced therefrom, it is that as others are further integrating their respective businesses, Appellees must extend their vertical trust in order to be in position successfully to compete with the new integrations. We submit that the conclusion does not logically follow.

It is true that there were organized from 1920 to 1929 large distributors of foods, and these generally in the past made satisfactory profits. Of the large integrators, General Foods is the most important and may with fairness to Appellees be taken as typical. It is also true that some retailers do some manufacturing, but this is a relatively small part of their re-

[11] Swift & Company Year Book, 1930, pp. 22, seq., Rec. 720, 1172.

spective businesses. Kroger is the most favorable example to Appellees of this class, and he has relatively slightly extended his manufacturing facilities since 1920.'

That integration may be extended too far is generally believed by students of political economy; and, it certainly is not proved in this case that integration is economic to the extent that the integrator should perform all the services of production and distribution, nor does the proof show the point where the maximum of efficiency is reached. The question, however, is economic and not legal.

If the facts justified, as we submit they do not, a finding, and the Court should find, that all or any stage of integration is economically advantageous, it would not follow that Appellees should further extend their power over the production, manufacture and distribution of food products. Nor does this record show that this integration has or likely will injure Appellees. Appellees have unduly magnified the extent that the integration has proceeded along vertical lines. It is true that many of these integrated food businesses slice bacon, boil hams, buy and put up under their own labels the products of others and do like acts generally referred to by the witnesses as "processing." They do not raise live stock, peaches or vegetables. Some of them do canning but by no means do even these thus obtain all their requirements. They are customers for packer and canner. The great food companies are largely mergers of pre-existing and smaller concerns, and are in part the result of a stock market with an appetite for all kinds of securities, but this appetite is fully satiated.

Armour, Cudahy and Swift are all alike subject to the Consent Decree and to the effect, if any, of the tendency towards integration, yet the returns of these companies vary widely. There is no differentiation as to these factors and therefore logically we must look elsewhere for an explanation of the different profits earned by these three packer-defendants. A few figures taken from Appellees' Exhibit 72 are enlightening. These figures show for the years 1920 to 1929 for these packers, their total sales and the per cent of returns on stockholders' investment:

	Swift		*Armour*		*Cudahy*	
	Sales in Millions	Profit %	Sales in Millions	Profit %	Sales in Millions	Profit %
1920	1,052	2.17	1,260	.19	288	1.76
1921	735	-3.37	842	-15.16	173	-5.08
1922	655	6.16	864	-3.40	160	4.20
1923	761	6.20	862	5.26	190	6.70
1924	785	6.60	875	6.57	203	10.86
1925	692	7.12	970	5.04	224	8.48
1926	953	7.13	808	3.41	231	10.70
1927	931	5.47	961	.19	233	5.91
1928	972	6.63	972	4.09	251	6.44
1929	1,035	5.76	1,004	3.54	267	6.26

(Exhibit Rec. 888a.)

In 1927, as this Exhibit also shows, Swift had a capital of $223,000,000; Armour of $286,000,000; and Cudahy of $40,000,000. The one with the least capital earned the highest, and the one with the largest capital, the lowest rate of return.

All the three sell in great quantities to large food dealers. Swift has earned 1922 to 1929, all after the depression of 1920 and 1921 had passed, an average of 6.38 per cent on stockholders' investment, added during the same time to his surplus and reserve over $16,000,000.[10]

Kroger has two packing plants; he had one in 1920, and does manufacture some meats, but he buys about five times as much as he slaughters.

E. Need of Further Utilization of Branch Houses.

This is an old claim and one definitely waived by the Consent Decree.[11]

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[10] Exhibit 72 and balance sheets shown in year books of Swift for 1923–1930.

[11] See the claims of Appellees before the Interstate Commerce Commission (above p. 9), and Exhibits 165 and 166.

Even if this were not already an adjudicated question, this record shows that Swift has increased the number of his branch houses since 1920 and that wholesale grocers and canners have a surplus of facilities. Why should Armour buy Morris' branch houses which competed with his and ask to violate his contract in order that he might increase their use? Why should Swift build more branch houses after agreeing not to sell groceries and then ask that he be absolved from his agreement in order fully to utilize his newly acquired branch houses?

F. The Live Stock Grower.

Several growers of live stock testified. Of these it may be said that generally they express a desire that the Appellees be *not* permitted to own stockyards, but permitted to retail meats; and, as to retailing groceries, some think that permission should be granted while others have no opinion on the subject.

Mr. Mollin (R. 477, 478) thought "unfair advantages" might be used by Appellees who "might tend to depress" the livestock market.

The court below having denied Appellees release from the injunction as to stockyards and as to the right to retail groceries or meats, in effect denied the contention of Appellees as to the stockyard interests and no cross appeal was taken.

G. Fruit and Vegetable Producers.

(1) General Statement.

The canning industry, like other industries, is suffering from overproduction, the result of an exhorbitant desire for expansion and volume. The industry, finding itself with more goods to sell than the consumer demands, is seeking a remedy; and in the vain attempt to evade the economic law of supply and demand, there is a grasping at straws and the expression of wishes supported not by logic but by desire. Among the remedies suggested is that of placing themselves in the hands of the Big Four with the hope that thereby people can be made to eat more peaches, peas, corn and beans; and that the

Big Four, by adding to their present volume, may save selling cost, and lower the price to consumers while raising it to grower. Wishes may father thoughts but they produce no reasons.

(2) Peach Canners.

Armour, through the form of loans and guarantees, is in the canning business and was prior to 1920, and these canners are in a situation similar to that of the growers.

(3) Vegetable Canners.

These are in somewhat similar situation to the peach-canner, but some of them at least have a better knowledge of their needs, the causes of their situation and the remedy therefor. Royal F. Clark, a large canner and ex-president of the National Canners Association, in his testimony evidenced a sound judgment and showed that he had given intelligent consideration to the problem (R. 793 ff). If the fallacy of the Appellees' claims that the canner will be helped by them is not obvious, the reading of Mr. Clark's testimony will convince that it is a fallacy and an unsound economic opinion.

H. Dairy Products And Produce.

Mr. Bird at great length described the dairy and produce business of Swift and detailed some of the plants purchased since 1920.[11]

Because of the opinion of the Court, it was not deemed by counsel necessary to insert testimony on the various and questionable activities of Appellees in the dairy part of their businesses, but it is submitted, that there are yet threats and circumstances of danger that would make it unsafe to the public to surrender the decree to which Appellees agreed to adjust their businesses.

I. Stockyards.

We do not think the danger of packer-control over stockyards can be better presented than it was presented by Ap-

[11] Increase of plants, R. 543; sells a greater percentage of eggs, butter and cheese now than in 1920, Exhibits 138, 139, 141.

pellees' witnesses. One of these, F. E. Mollin, Secretary, American National Livestock Association, has explained the situation. (R. 477).

Other livestock growers expressed similar apprehensions.

The Appellees, through stock holdings and otherwise, still have some interest in stockyards and stockyard banks.

J. Packers And Stockyards Act, 1921.

No testimony was presented with reference to this claim; but, of course, the Court has judicial knowledge of the statutes and of legislative history in connection therewith. As the Court did not modify the decree with reference to stockyards, this issue was decided against Appellees.

K. Changes in Court Decisions.

The petitions claim that Supreme Court decisions have changed the law since 1920. Decisions of Courts do not change law, they announce law. See also above, p. 29.

L. The Effect Of The Consent Decree On Appellees.

It is submitted that when Appellees made the contract of February 27, 1920, and agreed that it might become the decree of the Court, they are presumed to have known that the decree would affect their methods of doing business, restraining their wills as stated in their agreement. It therefore seems immaterial here to determine whether or not that agreement restrained or injured Appellees.

It will also be recalled that Mr. Justice Bailey found that Appellees did not give full and frank testimony with reference to this claim. Appellees did not show what their earnings were in normal times prior to 1920.

Such glimpses as Appellees give us do not in this respect show any adverse conditions since 1920, excepting of course the period of declining inventories from which all industry likewise suffered. The Swift year books in evidence[33] give us some light. Brief statements from these are:

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[33] These may be referred to Rec. 720 and 1172.

For 1921: "The packing business is in as favorable a condition as it has been at any period during normal times, and the prospects are good."

For 1924: "I am glad to report that Swift & Company has had a satisfactory year. We are on a fairly normal basis of operations, judging by prewar standards."

For 1925: "I am glad to express the opinion that the company is now in a *better position and has better prospects than ever before.*"

For 1926: "Our sales for 1925 exceeded $875,000,000, the largest of any year since the war period which was, of course, abnormal."

For 1927: "I have unlimited faith in the future of Swift & Company. Having seen it grow from practically nothing to its present size, I firmly believe that the principle upon which it is established and has developed will continue to make it a success."

For 1929: "Swift & Company stock is essentially an investment rather than a speculative stock. It has now paid dividends regularly for forty-four years," and for 1920 to 1929 inclusive at the rate of eight per cent.

If Armour does not do as well and Cudahy does better, the Consent Decree is not the explanation as all three are parties thereto.

The Big Four had earnings in 1927 better than those of other Federally inspected packers. The Government's Exhibits 7 to 12 show earnings of all packers. Exhibit 9 is the worst showing for the independent packers but the worst showing of these is evidence of what the Big Four can do. This exhibit shows that for the year 1927 the Big Four packers earned net profits of $16,299,602.81; that of the 187 Federally inspected slaughterers other than the Big Four, there was a net loss of $515,716.20. As these two classes are under the same inspection, this comparison shows that the Big Four were in this year relatively in better shape than their competitors. The profits of the Big Four and of the other Federally inspected slaughterers vary widely. For 1929 (Exhibit 7)

the first of these had net profits of $27,945,776.65, while 211 Federally inspected slaughterers had net profits of $8,050,-667.72.

Swift has increased the number of his branch houses and has purchased other packing plants and creameries. That he may own less refrigerator cars than formerly is the result as was alleged in the original petition of the United States because of a shift to motor trucks.

Swift's sales have increased each successive year, except 1925, since the year 1922. Armour's sales were $140,000,000 higher in 1929 than in 1922 although the upward progress was not regular. What the sales were in the normal years prior to 1920, say 1913 and 1914, Appellees do not show.

CONCLUSION.

Mr. Justice Bailey found sources of danger from the past and present practices of Appellees; and, it is submitted, that this court need not look beyond his opinion to find ample reasons for requiring Appellees to keep their contract.

The learned trial Judge kept the injunction as to "stockyards, terminal railroads and market newspapers" and (R. 1057) said:

> "If the injunction as to these matters remains *unchanged* they cannot be made the basis of monopoly."

He also found (R. 1056) a diminished danger from the ownership of these, but said:

> "I think that it would be unwise to modify the Decree in these respects. There are many opportunities for secret preferences in the operation of the stockyards and of the terminals, and much for propaganda and distortion of news in newspapers. It is probable too that Congress would have made the provisions of the Packers and Stockyards Act even more stringent had it not been for the Decree."

He said the use of peddler cars "is sound as an economie and business proposition" (R. 1058). If this is true, it was true in 1920 and Appellees agreed to limit such use to meats and meat products.

He said, "there has been a great increase in the number of combination food stores, those retailing both meats and groceries" (R. 1058). But he found that it was contrary to the policy of Congress (R. 1059):

> "to permit the defendants to engage in the retailing of their own products."

He further said (R. 1058):

> "The control by the defendants of the great amount of interstate commerce in meats and other articles from the producer to the consumer would probably result in the almost complete annihilation of the independent retail grocer, already a minority in volume of business. * * * there is a real danger of the misuse of that power."

While the learned trial Judge found a "diminished danger" of "reciprocal buying," he said (R. 1057):

> "I consider this an element of danger with opportunities for secret rebates and preferences, but the government admits that while this practice on the part of petitioners shows a tendency to unfair trade practices, it is not illegal and by no means confined to the petitioners."

From the undisputed facts and from the conclusions in the opinion of the trial Judge, it is submitted that the contract of Appellees should be kept and the original decree enforced according to that agreement.

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